IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1743 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NATIONAL INSURANCE CO.LTD.

Versus

DURLABHJI JAMNADASA

Appearance:

MR R. H.MEHTA for Petitioner

MR SURESH M SHAH for Respondent No. 1

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: /03/2000

CAV JUDGEMENT

#. The petitioner tenant is the insurance company against whom the respondent plaintiff had filed the suit being Regular Civil Suit No.356 of 1979 in the court of Small Causes at Rajkot for getting decree for possession on the ground of change of user of the suit premises as

well as on the ground of non user of the suit premises for more than 6 months immediately preceding the date of the suit . A decree was also sought for on the ground of personal and bonafide requirement of the plaintiff.

#. The Trial Court was pleased to dismiss the said suit for possession. However, in appeal the Appellate Court came to the conclusion that the defendant has changed the user of the suit property by not using the same for the purpose for which it was let . The Appellate Court also found that there was also breach of the terms of tenancy by the defendant and on the aforesaid grounds, the appeal of the appellant-plaintiff was allowed and a decree for eviction was passed. The unsuccessful tenant has filed the present revision application challenging the aforesaid judgment and order of the the learned Appellate Judge passed in Regular Civil Appeal No. 302 of 1981.

#. The facts leading to the present revision application are as under:

The plaintiff is the owner of the premises known as Durlabh Chambers, Dhebar Road, Rajkot. Two rooms on the first floor of the said property were let out to the insurance i.e. Ruby General Insurance Company Ltd. in the year 1963. A rent note was executed at that time and as per the terms in the rent note, the suit premises was to be used for the purpose of business of of the defendant. Said Ruby Insurance Company was merged and amalgamated with the petitioner insurance company in the year 1973 when the General Insurance business was nationalised and accordingly the defendant National Insurance Company is the tenant of the suit premises since 1973 onwards.

It is alleged by the plaintiff that the suit premises was let out to the defendant for the purpose of doing their insurance business. However the defendant has shifted its insurance business to other place known as 'National House' and therefore, according to the plaintiff since the defendant is not carrying on insurance business in the suit premises, the defendant has committed an act of breach of terms of tenancy. According to the plaintiff, the defendant is also not using the suit premises for more than 6 months immediately preceding the filing of the suit and therefore, on the aforesaid grounds i.e. breach of terms of the tenancy as well as for non user of the premises, eviction decree was sought for by the plaintiff. The plaintiff had also prayed for decree on the ground of personal and bonafide requirements of the plaintiff.

The defendant appeared in the suit and filed written statement exh.23. It was contended that there was no change of user or breach of terms of tenancy by the defendant. It was stated that Ruby Insurance Company was merged and amalgamated with the National Insurance Company. It was stated in the written statement that the suit premises is used for the purpose of the business of the insurance company and not for any other purpose. It was also the further case of the defendant that the suit premises is used in the true letter and spirit of the terms and conditions of the rent note and that therefore, there was neither any breach of the terms of tenancy nor any breach of the rent note or any breach of the provisions of the Bombay Rent Act which can be attributed to the defendant. On the aforesaid groundd the suit of the plaintiff was resisted by the defendant insurance company. It was also pointed out that looking to the expansion of insurance business, the defendant insurance company is still in need of the premises in question and therefore, if the decree for eviction is passed the defendant insurance company will suffer greater hardship. The last averment was in response to the prayer of the plaintiff for possession on the ground of bonafide requirements. Ultimately, the defendant prayed for the dismissal of the suit.

#. From the above pleadings of the parties, the Trial Court framed various issues at exh.24.

#. The Trial Court after recording the evidence and hearing the arguments of both the sides , came to the conclusion that looking to the evidence on record, it cannot be said that the defendant has committed any breach of the terms of the tenancy and that the defendant is carrying on its business of insurance by keeping necessary records of the insurance business etc. and that the plaintiff has failed to prove that the premises was not used for more than six months prior to the filing of the suit. The case of plaintiff for bonafide requirement was also negatived by the Trial Court. The Trial Court accordingly dismissed the suit for possession. The Appellate Court came to the conclusion that the suit premisses is used by the the defendant insurance company only for the purpose of casual use. The appellate court was of the opinion that the suit premises is used only for storing salvaged goods and for keeping record and that aforesaid use cannot be said to be in consonance with the purpose for which the premises was let out initially. On the aforesaid grounds, the Appellate Court was of the opinion that there was a

change of user and the act of the defendant was contrary to the terms of tenancy and that since the actual business of insurance was not carried out, it would also be an act of non user also and accordingly the appeal of the plaintiff was allowed by the learned Appellate Judge. Aforesaid judgment and decree of the learned Appellate Judge is impugned in the present revision application.

#. At the time of hearing of this Revision Application Mr. R.H.Mehta learned advocate for the petitioner defendant has argued that the learned Appellate Judge has committed an error of law in interpreting the term 'business' in a narrow sense and accordingly has committed an error in decreeing the suit of the plaintiff on the ground of non user and on the ground of breach of terms of tenancy. According to him, storing salvaged goods as well as keeping important records of insurance business is an important and integral part of business of insurance and therefore, if it is found that the defendant is using the premises for the aforesaid purpose, it cannot be said that the defendant company has closed the business of insurance in the suit premisses. In that view of the matter, it was submitted that the decree of eviction passed by the learned Appellate Judge is required to be interfered with by this court while exercising revisional jurisdiction under section 29(2) of the Bombay Rent Act and that the decree of the Trial Court is required to be restored. As against this Mr. S.M. Shah learned advocate for the respondent-plaintiff argued that casual use of the suit premises by the insurance company cannot be said to be the real use of the suit property for the purpose for which the same was let out. It was also submitted that merely by keeping the record, it cannot be said that the defendant company is using the suit premises for the purpose of insurance business and therefore, according to him, the learned Appellate Judge has rightly appreciated the evidence on record and therefore, aforesaid decree is not required to be interfered with by this court in the present revision application.

#. I have considered the arguments of both the sides and I have also gone through the oral and documentary evidence on record.

#. When the aforesaid premises was let to Ruby Insurance Company it was provided in the lease agreement that the Ruby Insurance Company was to occupy the aforesaid two rooms for the work of insurance and other ancillary work. It has been stated in condition no.10 of the agreement that if the rented premises of office is closed and the

lessee leaves the business, the lessor was entitled to take the possession of the premises by even breaking open the locks. What is important therefore, is that the defendant was supposed to carry out the insurance business and other such incidental work in connection with the insurance business. The question which is required to be considered here is that if the suit premises is used for keeping the record of the insurance business and other salvaged materials of the insurance company etc. can it be said that the defendant is not using the suit premises for the purpose of its insurance business ? It seems that the Ruby Insurance Company being a small insurance company was transacting its actual business in the suit premises itself. But after the nationalisation of the said company and merger of the same with the present defendant company and because of expansion of the insurance business of the defendant insurance company instead of actually transacting commercial activity from the rented premises, it started using the same for the purpose of storing the records of insurance business as well as keeping salvaged goods. It is submitted by Mr. Mehta learned advocate for the petitioner that keeping the goods or such other materials is also one of the important and integral part of the business. It is submitted by Mr. Mehta for the petitioner that keeping and storing policies of insurance and such other documents concerning insurance, is vital part of the insurance business. It may be that for the purpose of taking out those documents, it may not be necessary for the defendant to keep the suit premisses open for the whole day by keeping permanent staff. But none the less even with an interval of a week or so, if the premises is used for the purpose of taking out documents such as the policy of insurance etc., it cannot be said that the premises is not used for the purpose for which it was let to the defendant. According to him, the business cannot be given such a restricted meaning. In my view, it is not possible to accept the say of the plaintiff that business means actual commercial transaction only and if any incidental use is carried on in connection with the business , it cannot be said that the premises in question is not used for the purpose of the business of defendant . In order to carry on the business of insurance, or such other type of business, preservation of records is an integral part of such business and therefore such a narrow meaning cannot be given so far as business activity is concerned. In fact in clause 3 of the rent note, it has been provided that in the rented premises the defendant has to carry out insurance work and such other work in connection with insurance business. If the defendant company is using

the suit premises for the purpose of residence of its employees or keeping the suit premises absolutely vacant, then it can be inferred that there is a change of user or there is a case of non user of the suit premises for the purpose for which it was let . But in my view even if the defendant is not actually transacting the business of insurance and if the premises is used for the purpose of keeping salvaged goods or keeping documents pertaining to the insurance business, it cannot be said that the defendant has stopped using the premises for the purpose of insurance business. It is pertinent to note that without maintaining the record or keeping custody of the record, it cannot be said that the defendant can still carry on its insurance business. If the suit premises is used for storing the record of insurance business of the defendant it cannot be said that the premises is not used for the purpose of business of insurance by the defendant. It is not necessary that there should be actual office working during the office hours and that there should be actual transaction of business in the suit premises. Therefore, user of the suit premises for the purpose of keeping the record and salvaged goods cannot be said to be the use which is contrary to the terms of the lease or that there is breach of terms of tenancy by the tenant.

#. The word 'business' is having a very wide meaning and for keeping books and documents and such other records required for the business activity are also to be included in the term business. It therefore, cannot be said that the defendant has stopped the business activity in the suit premises. Keeping of record also can be included in the mercantile activity of the defendant. In that view of the matter, in my view the Trial Court was right in coming to the conclusion that from the evidence on record it is not possible to believe that there was change of user or that the premises was not used for the purpose for which it was let . Even as per the lease agreement, it is not possible to believe that the letting was only for the purpose of running the office of insurance business and not for any other anciliary use in connection with the business of insurance.

##. It has been laid down by this court in 1986 GLH 389 in the case of Shah Ochhavlal Motilal & anor. vs. Kansara Dhanalaxmi Becharlal that the onus to prove the non user is on the plaintiff and that the plaintiff cannot succeed on the weakness of the defendant. It was found that the plaintiff has no personal knowledge about such non user and that this court allowed the revision application by setting aside the decree of both the

courts below. In 21 GLR 242 in the case of Bhabhuytmal Rikhbaji Sharma & anor. Manubhai Madhavji Patel & ors. this court has held as under:

"The rent note contains two clauses 9 and 10 which lays down in clause 9 that the premises were to be used for sale and purchase of utensils scrap and no other business was to be carried oh the said premises without the consent in writing. Clause 10 provided that the said premises were not to be used for residence of the tenant nor the tenant had to store any inflammable articles or such articles which is cause nuisance to the adjoining neighbors. The court has gone into the aspect that breach of restrictive covenants prohibiting the change of user per se would not entitled a landlord to recover possession unless it results in substantial injury or damage to the property leased for the purpose of appreciating his contention that the restrictive covenants in the rent note are inconsistent with the provisions contained in sec. 13(1)(a) of the Rent Act. The restrictive covenants contained in clauses 9 and 10 of the rent note are clearly inconsistent with the provisions contained in sec.. 13(1)(a) as well as 13(1)(k) of the Rent Act.

For successful enforcement of a condition of a contractual tenancy prescribed on the part of the tenant, it must be one arising out of the tenancy and relating directly to the use of the demised premises. It must have nexus with the tenancy. The obligation which has been prescribed by the restrictive covenant contained in clause 9 that though the tenant is entitled to use the premises for business purposes, namely, of sale and purchase of utensils or utensils scraps, he cannot carry on any other business without written permission of the landlord, is a negative obligation which is purely personal and collateral to tenancy. Such covenants which are not arising out of tenancy or which have no relation with the tenancy or reasonable and prudent used of the demised premises and which are more in nature of personal obligation on the part of tenant are not enforceable since they do not constitute the terms and conditions of the tenancy and therefore, the restrictive covenant contained in clause 9 of the Rent Note in so far as it prohibited the tenant from carrying on any

> business other than that of utensil scrap without permission of the landlord is purely an obligation collateral to the tenancy and personal nature and therefore, not enforceable."

However, so far as the present case is concerned , as stated earlier, as per the evidence on record, it cannot be said that there is even any change of business by the defendant or that the premises in question is used contrary to the terms of the rent note.

##. Mr.Shah learned advocate for the respondent landlord has argued that as per the rent note , the premises was required to be used only for the purpose of insurance office and since the evidence on record is clear that no insurance business is transacted in the suit premises, the decree for possession is required to be passed on the ground of breach of terms of tenancy. According to him, the office of insurance is closed in the suit premises and it is used for the purpose of godown. For that purpose, he has relied upon the cross examination of the tenant wherein the officer of the defendant corporation has stated that the premises is used for a short period for the purpose of collecting the documents and that too not every day but with some intervals. As per the panchnama exh 41, it is found that there were small heaps of dust when the suit premises was opened for the purpose of drawing panchnama. It is no doubt true that looking to the evidence, the premises is not open every day for regular office work. However, there is no dispute of the fact that insurance documents were found to be kept in the suit premises and simply because there were some heaps of dust in the suit premises, it cannot be said that the premises is not used for the purpose of keeping the records of the defendant insurance company. It therefore, cannot be said that if the suit premises is used for keeping records of insurance business, it may amount to non user of the premises for the purpose of insurance business. As observed by me earlier, keeping record is also an essential and integral part of the business of insurance and in that view of the matter it cannot be said that the same is not used for the purpose of insurance business. Mr. Shah learned advocate for the respondent has relied upon clause 10 of the rent note which says that if the defendant leaves India by closing down the office of insurance, then the plaintiff will be entitled to take possession of the premises by breaking open the lock. No doubt, it is so stated in clause 10 of the rent note. However, reading clauses 3 and 10

together it is clear that the purpose of letting is for insurance business and therefore, it cannot be said that the insurance business is completely closed by the defendant simply because the premises is used for the purpose of keeping the documents and salvaged goods of the insurance company. Simply because the staff of the defendant-insurance company is not sitting in the suit premises during the office hours and that if the suit premises is opened only for the purpose of collecting the documents once in a week, it cannot be said that there is change of business or that the premises is not used for the business purposes of defendant insurance company. It is not disputed that the documents which are lying in the suit premises are only pertaining to the insurance business of defendant and therefore, it cannot be said that the premises is not let for the purpose for which it was let to the defendant.

##. Mr. Shah learned advocate for the respondent-plaintiff has relied upon a decision reported in AIR 1993 SC 2646 in the case of Dashrath Baburao Sangale & ors vs. Kashimath Bhaskar Data In that case the tenant was let out the premises for doing a specific business and instead of selling sugar cane juice, the tenant started selling clothes and ready made cloth. It was found by the Supreme Court that since under the agreement he was to sell sugar cane juice he has changed the business of selling sugar cane juice to selling cloth. However,, so far as the instant case is concerned as discussed by me earlier, the premises was let for the purpose of insurance business and in fact the same business has been continued in the suit premises because the premises is used for the purpose of keeping the documents in connection with the business of insurance of the defendant. Mr. Shah has relied upon a decision reported in 38(2) GLR 1108 in the case of Bai Hariben Ambashanker Wd/o Ambashanker Dhanjibhai & ors. vs Shantilal Jadavji Shah. In that case the premises was let out for business purpose but it was used for residence. In that view of the matter it was found that there was a change of user of the premises let out. However, the fact of the present is entirely different. As discussed earlier, if the insurance company has subsequently started using the premises for the purpose of keeping the records pertaining to insurance and for keeping salvaged goods it cannot be said that there was any change of user of the suit ipremises. But if the defendant uses the suit premises for the residence of their employees , then certainly it can be said that there was change of user. Mr. Shah has also relied upon a decision of this court reported in 39(2) GLR 1650 in

the case of Suryakant Kanji Bheda vs.Hemlataben Indukumar Rajania and pointed out that mere casual visit to the suit premises cannot be said to be user of the premises and therefore, according to him if the premises is used casually, it would none the less amount to non user. However, looking to the purpose for which it is used by the defendant, it is not necessary that every day they must come to the suit premises for the purpose of taking out the record. The record is to be taken out as and when necessity arises. It therefore, cannot be said that simply because the premises is open for the purpose of taking out the documents at some intervals, it may amount to casual visit only. However, looking to the facts and circumstances of the case it cannot be said that there was only casual use of the suit premises in so far as the question of non user is concerned.

##. In view of what is stated above , it cannot be said that the defendant has changed the user of the suit premises or that the defendant is not using the suit premises for the purpose for which it was let . It is the say of the defendant that the premises is used for keeping the records and salvaged goods of the insurance company and that aforesaid use is very much essential for the incidental purpose of insurance business and the Trial Court has also found that the premises is being used for insurance business. Keeping books of accounts and other records pertaining to the insurance business is a part and parcel of business of insurance. Even column 3 of the rent note also permits the defendant to use the suit premises for the purpose of insurance business. In that view of the matter, the Appellate Court has committed an error of law in coming to the conclusion that if the premises is used for the purpose of keeping the records of insurance, that would amount to change of user or that the premises cannot be said to used for the purpose of insurance business. In my view the appellate court has given a very narrow meaning to the term "business" In the circumstanes, the judgment and order of the appellate court is required to be interfered with as it suffers from error of law. Hence the judgment and order of the learned Appellate Judge is set aside and the judgment and order of the Trial Court is restored. This Revision Application is accordingly allowed. Rule is made absolute. No order as to costs.

(P.B.Majmudar.J)

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